

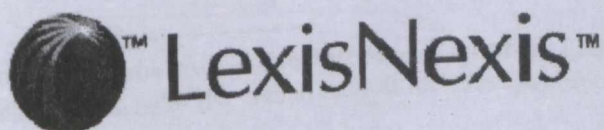
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MULTICULTURALISM AND THE LAW

Multiculturalism, Law and Society

Endangered Multi-Cultural Heritage in Penang: An Evaluation of the Laws and Policies

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**ENDANGERED MULTI-CULTURAL HERITAGE IN PENANG: AN EVALUATION
OF THE LAWS AND POLICIES**

By,

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ABSTRACT

The multi-racial society in Penang has brought about the evolution of a multi-cultural historical city, nominated for listing in the World Heritage List. Although the repeal of the Rent Control Act 1966 was among others to address the problem of decaying inner city environment, in 1999, Penang could not escape from being listed by the World Monuments Watch as one of the World's Hundred Most Endangered Sites. This paper explores the laws and policies of the conservation and preservation of cultural heritage in Penang which contributes to this vulnerable phenomenon.

Introduction

Penang was listed by the World Monuments Watch as one of the World's Hundred Most Endangered Sites in 1999. A year later, the Cheong Fatt Tze Mansion at Leith Street was awarded the inaugural UNESCO Asia-Pacific Heritage Conservation Award 2000 (Award of Excellence 2000) and Cheng Hoon Teng Temple, was awarded the Award of Merit, UNESCO Heritage Awards 2002. Both the awards were won by heritage buildings in Penang and this show the private sectors achievements and public-private initiatives in successfully

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restoring the structures of heritage value in Penang.¹ Does this mean that the multi-cultural heritage in Penang is improving? This article explores the laws and policies which affect the multi-cultural heritage in Penang in view of the recent developments in the national and international protection of cultural heritage.

The Historical Multi-Cultural Heritage Centre of Penang

The site nominated for inclusion in the World Heritage List is part of an inhabited conurbation, Georgetown, the State capital of Penang.² Referred to as the historic centre, the site comprises the 18th century town grid close to the waterfront and its surrounding historic neighbourhoods, which are multiracial and multireligious in composition. The site covers approximately 108.9 hectares as core area and 59.75 hectares as buffer zone. The site is delineated according to precincts, in deference to prevalent activities of the past as follows:

The Waterfront District

Early colonial buildings provide a historical backdrop to the Esplanade and the harbour area. The brick masonry Fort Cornwallis rebuilt from the original wooden stockade at the tip of the cape of the island, marks the beginning of the settlement. The European style facades of office buildings on Weld Quay and Beach Street recall the early entreport activities of the town.

The Historic Commercial Centre

The original town grid laid out by Francis Light, a British country trader is where the early commercial town developed, close to the waterfront. Here the various ethnic groups were allotted their own street, the Eurasians at Bishop and Church Street, the Chinese at China Street and the Indians at Market and Chulia Streets. Today the area is a contrasting mixture of vernacular shophouses, ornate European style commercial houses and modern office

¹ Richard Engelhardt, "Evolution and Innovation in the Conservation of Asia's Urban Heritage", Keynote Address in the 10th World Conference of Historical Cities, Ballarat, Australia, October 29 to November 1, 2006, retrieved from http://www.leaguehistoricalcities_ballarat.com/library/post/highlights/, viewed on 8.4.2007.

² See whc.unesco.org/en/list/1012, viewed on 2.4.2008.

buildings. "Little India" on Market Street is the focal point of the Indian community in Penang and the neighbouring states.

The Guilds and Trades Precinct

Traditionally, guilds and societies were significant social organizations which had contributed to the business, social and cultural life then. A number of artisan guilds and associations are located at Chulia Street, Muntri Street and Love Lane. Chulia Street, originally the domain of Indian Muslim community in the 19th century, is today culturally diverse in both its built heritage and contemporary activities.

Mosque and Waqf Enclave

The wealthy Arab and Indian Muslim traders set up waqf (endowment land bequeathed to the community for religious and charitable purposes) and built their own mosques. The Acheen Street mosque and the Kapitan Keling mosque are the two oldest mosques in Penang, built in contrasting architectural styles. The establishment of the mosque complex in Acheen Street created a hub for Malay traders and local Islamic scholars, and accommodated pilgrims from Malaysia, Indonesia and Thailand enroute to performing the haj in Mecca. Very significantly, this area overlaps with the Chinese Clans Enclave thus reinforcing the religious and cultural coexistence feature of traditional urban institutions then.

Chinese Clans Enclave

The five major Chinese surnames, the Khoo, Cheah, Tan, Lim, Yap and Yeoh, have their clan or kongsi houses in the vicinity of each other. These institutions still maintain a social system of looking after the welfare of the respective clan communities and promoting the virtues of Confucian philosophy. The clan temples are set in large compounds, screened from the street by surrounding shophouses and accessible by narrow gateways.

Development of Administration of Heritage

Under the Federalism structure in Malaysia, preservation of historical buildings falls under the jurisdiction of the Federal government.³ The Ministry of Tourism and Culture was established on 20 May 1987 following a merger between the Ministry of Culture, Youth and Sports' Culture Division and the Tourism Development Corporation of Malaysia, Ministry of Trade and Industry. On 22 October 1992, the Ministry was renamed as the Ministry of Culture, Arts and Tourism. On 27 March 2004, the Ministry of Tourism was officially established. It followed the break-up of the Ministry of Culture, Arts and Tourism into the Ministry of Tourism and the Ministry of Culture, Arts and Heritage respectively. This is a clear acknowledgement of the fact that the government perceives that heritage does not exist principally as a tourist attraction, but is the embodiment of the history and values of the Malaysian people and this principle is to be transparent through the introduction of the Ministry of Culture, Arts and Heritage. Despite its rich cultural heritage that includes cultural and historic structures and landscapes, Malaysia is a late adapter to preservation of cultural and historical buildings. The preservation of multi-cultural heritage by a specific legislation was first introduced in a narrow scope under the Antiquities Act 1976, which only governs West Malaysia⁴ and later in 2005, the more comprehensive statute on preservation of heritage buildings was introduced i.e. the National Heritage Act 2005, which governs the whole of Malaysia.⁵

Control of Rent Act 1966 and Its Aftermath

In Malaysia, all pre-war rented properties came under the Control of Rent Act 1966. Khoo Su Nin considers this act as the reason to the widespread survival of old shophouses ensembles in Georgetown.⁶ The act also ensured this building type to be in the original condition but

³ Item 13(b) of the State List under the Malaysian Federal Constitution. Although the statutes on preservation of heritage buildings have been enacted under the Federal Law, i.e. the Antiquities Act 1976 and National Heritage Act 2005, consent of the states and co-operation of the states is a requirement under those Federal statutes.

⁴ See section 2 on the definition of ancient monument and section 3.

⁵ See section 1(2) and section 32.

⁶ See Khoo Su Nin, 1993. *Streets of Georgetown, Penang: An Illustrated Guide to Penang's City Streets and Historical Attractions*, Penang: Janus Print and Resources.

some has become dilapidated. However, it could be argued that due to the act, the low rental of buildings built before 31 January 1948 deter their owners from up-keeping and maintaining the buildings let alone restore them.⁷ However, with the repeal of the Control of Rent Act 1966, many of the early businesses set up by the pioneer North Indians in Penang - Beach Street, Bishop Street, Penang Street, King Street and Chulia Street no longer exist.⁸ A study done in February 2001 for the Consumer Association of Penang indicates that, as a result, fully a third of the inner-city could empty if the currently threatened evictions are eventually carried out.⁹

The Penang Chief Minister during the repeal of the Control of Rent Act 1966, Koh Tsu Koon said that he is working out a set of guidelines for what he calls "adaptive re-use" of heritage buildings, where preservation of the historical buildings in the course of usage of the buildings for another purpose. Alternatively, he suggested that one can preserve the facades and allow the building of three to five stories at the back, depending on the heritage and historic value of each building.¹⁰

Many developers are now using the term adaptive re-use in Georgetown. One of the biggest landlords in the city, Khoo Kongsi - the clan association of the Khoo family - has a scheme for the 24 houses that surround the historic Khoo Kongsi temple. The trustee, Khoo Kay Hock planned extensive renovations where the bottom floor would be used for shops and restaurants and the upper floor would be used to offer budget accommodation.¹¹ The Khoo Association, which has raised rents by 50% on 119 other houses it owns in the city, insists the renovation plan will preserve the entirety of the temple area in its original form, while

⁷ The Rent Control Act 1966 was passed after World War II to maintain rents at the same price as had prevailed before the war in order to ensure affordable housing. In the event, because the Act failed to cover sub-tenancies, the actual impact of the Act was quite different from what was intended. In practice what happened was that tenants paid to their landlords the pre-war rent that was well below the market rate, and the tenants then made a profit by sub-letting the premises at the real market rate. As a result, landlords lost out and therefore declined to maintain or upgrade their properties, which consequently deteriorated over the years.

⁸ Jessica Binwani, "The North Indians: Rediscovering Roots in Penang", paper titled Indians in Penang at the Second Colloquium of 'The Penang Story', 22nd September 2001, Hotel City Bayview, Pulau Pinang, Malaysia, retrieved from The Penang Story, www.geocities.com/sounvx/penang_indians.htm, viewed on 21.4.2008.

⁹ Ibid.

¹⁰ Arjuna Rananawa, A City at a Crossroad - Caught between the Past and the Future, Can Georgetown Preserve Its Unique Qualities? Asiaweek, March 31, 2000 Vol. 26 No. 12, retrieved from pgoh13.free.fr/asiaweek3103.html, viewed on 21.4.2008.

¹¹ Ibid.

increasing its economic viability. However, it should be noted that heritage activists are opposed to this approach.¹²

The previous Chief Minister Koh insisted that the inner-city would not be affected by the approach of "adaptive re-use" of heritage buildings.¹³ He maintains his plan for adaptive re-use, which will come into force in the middle of 2001, where this step would preserve 5,000 houses and buildings. The Chief Minister then was armed with a \$60 million federal government soft loan, plus a \$5 million Penang government grant where he contended that these funds will be given to landlords - part grant, part soft loan - to help them renovate their buildings and also to try and retain as many tenants as possible.¹⁴ However, it is doubted that the government's move would retain the tenants at the inner city as the main problem of the tenants was the increase of rent where it was evident in as early as January 2001, over 600 Georgetown tenants received eviction orders dated March 31, 2001.¹⁵

Lack of Economic Advantages in Pre-War Buildings

Maintaining the special character of historical building may or may not be the best way of obtaining best value from the land which it occupies. At the same time, to encourage rapid and appropriate rehabilitation, the tax benefits should be made available to owners of outstanding properties in conservation areas, but only for a limited period, thus focusing restoration efforts in terms of both time and place. This financial incentive in the form of fiscal exemptions as suggested by Professor Grant did not materialize in Malaysia after the

¹² Ironically Salma, one of the presenters in the Second Colloquium of 'The Penang Story' (supra) said:

"They want to gentrify the buildings. We don't want theme parks here, with one calligrapher and one artisan retained just for show. What's the use of buildings without people?"

¹³ He says the population of the inner-city has been declining anyway and the government has been forced to close down two schools in the past few years.

¹⁴ Koh maintained that the state is in the process of identifying those trades that are essential for the preservation of the characteristics of Georgetown whereby most probably old people and the poor will have to move out to state housing projects or to low- and medium-cost housing, while through a process of conservation and re-development, some other people will move in.

¹⁵ Local politicians as well as citizens' groups such as the Consumer Association have brokered meetings between long-time tenants and their landlords. Teoh Poh Huat, a director in the Penang office of Property Consultants Henry Butcher, Lim and Long, says the local real-estate market is stable, and he does not expect large rent rises. Some landlords may see a chance to make money after many years of restrictions, he acknowledges, but if they force their tenants out through exorbitant rent increases, they may not easily find others to replace them. There was resistance to the move, particularly from a group called "Save OurSelves." On March 17, 2001 three of its members were arrested after they burst into a meeting attended by Chief Minister Koh. They were released on bail and more protests evolved due to the change. See Arjuna Rananawa, *supra*.

repeal of the Rent Control Act 1966 in 2000¹⁶ although it might have been successful as proven in Italy whereby almost the entire cost of maintaining and restoring protected properties is tax deductible and inheritance taxes are reduced or waived. From the Italian experience, this has led to a huge insurgence of private owners requesting their properties be placed on the protected property list.¹⁷

It should be noted that benefits of tax exemptions as suggested by Professor Grant above is not alien in Malaysia. Under the Malaysian Promotion of Investment Act 1986, hotel business and tourism industry are accorded the status of 'promoted activities and products' making it eligible for consideration of pioneer statutes and investment tax allowance.¹⁸ Hence, the Federal government should implement more incentives for heritage enhancement under the preview of promoted activities, where the local and state government should assist in framing of the guidelines for the purpose.

Beyond Conservation of Shop Houses and Temples: An Analysis of National Heritage Act 2005

"A century-old church, a Chinese temple, an Indian temple, and a Muslim mosque all within a five-minute walk from one another, tall urban structures stand beside the red-tiled roofs of Chinatown and "Little India" is just across the road, while the Malay kampungs lie on the outskirts." All these are the normal description of the heritage sites in Penang.¹⁹ However, industrial heritage is not part of the acknowledged cultural built heritage in Penang. Rubber smokehouses, tin mining gredges, sawmills and tobacco drying sheds should be considered as part of the historical monuments of Penang. Rubber planters bungalows should also be given

¹⁶ See Tan Sri Ahmad Sarji bin Abdul Hamid, "Town and Country Planning – 50 Years: Town Planning and Conservation: What Needs to be Done? 21 November 2007, retrieved from <http://www.badanwarisan.org.my/content/?cid=219>.

¹⁷ See Allison Carter Jett, "Domestic, Supranational and International Historic Preservation Legislation: Does it Protect Our Cultural Heritage or Restrict Development? Exploring Its Impact on Ancient Roman Monuments" 31 Ga.J. Int'l & Comp. L. 649, at p. 660.

¹⁸ See Part II-Chapter 1 and 2 of the Promotion of Investment Act 1986. Effective from 13 September 2003, reinvestment (expension, modernization and renovation) of hotels and tourist projects are eligible for another round of the existing incentives i.e. pioneer status 70% (100% for promoted areas) for 5 years or investment tax allowance of 60% (100% for promoted areas) for investment made within 5 years. See Investors' Guide Economic Report 2004/2005, retrieved from http://www.Treasury.gov.my/repositing/economyreport/2004_2005/BI/INVESTORS%20GUIDE.pdf viewed on 5.5.2007.

¹⁹ See the list of Heritage Buildings in Penang, specifically in Georgetown at www.pht.org.my/heritagebuildings.htm, viewed on 1.4.2008.

due recognition as although Malacca was home to the first rubber plantations, Penang was the first state or Straits Settlement as it was known then to be a significant producer of plantation products and the bungalows in Penang are amongst the oldest on Peninsular Malaysia.²⁰ With the introduction of the National Heritage Act 2005, buildings that have not been listed which have heritage elements as in the examples above may seem to have a more promising future.

However, the criterias of heritage buildings under the National Heritage Act 2005²¹ are questionable and proven in the Kuala Lumpur controversial case of Bok House.²² While the Heritage Commissioner appears to acknowledge Bok House as a landmark building, she says that it does not qualify as heritage under the criteria listed under the law.²³ Both the minister and the Heritage Commissioner refer to the high cost of conservation of the building as one of the reasons why the building was not gazetted, where no where in the Heritage Act 2005 mentions about the element of high cost of conservation of the building.²⁴ It is to be noted that such approach taken by the minister leads to serious implications as high cost could be viewed as an element to be considered in the policy of listing heritage buildings in the near future as the minister is responsible under Act 2005 to provide statements constituting the policy in relation to conservation and preservation of heritage.²⁵

²⁰ Peter, Waveney Jenkins, *The Planters's Bungalow: A Journey Down the Malay Peninsular*, Editions Didier Millet, Singapore, pp. 28, 35. For example, Bertam Estate, 1904, Kepala Batas has the finest estate bungalow remaining in the north of Malaysia. Its two wings are joined by a massive porte cochere, which extends beyond the driveway and incorporates beneath its arches a cool, terraced area. (see p. 34)

²¹ See section 2 of the National Heritage Act 2005 where since heritage imports the generic meaning of a National Heritage, cross reference is made to the criteria of National Heritage under section 67.

²² Bok House meets at least five of the criteria for declaration as a National Heritage under Clause 67 (2) (a), (b), (c), (d), (f) and (h) of the Act. See the Statement of Cultural Significance on Bok House, see <http://www.badanwarisan.org.my/images/upload/bokcss170706.doc>.

²³ The architectural and cultural significance of Bok House has been highlighted in architectural books including the *Guide to Kuala Lumpur's Notable Buildings* with a Foreword by the then Datuk Bandar YBhg Tan Sri Yaacob bin Abdul Latiff, in the *Encyclopedia of Malaysia Volume 5, Architecture* (Hisham Albakri (Editor), 1976), in Ken Yeang's *The Architecture of Malaysia in The Encyclopedia of Malaysia, Volume 5 Architecture*, Chen Voon Fee (Editor), Archipelago Press, 1998, as well as in *100 Years of Kuala Lumpur Architecture 1890-1990 published by* Pertubuhan Arkitek Malaysia, 1990, p. 44, and *Album 100 Tahun KL Menjadi Penguasa Tempatan* (Khoo Kay Kim, *Album 100 Tahun KL Menjadi Penguasa Tempatan*, Penerbitan Puteries, 1990), both of which were produced by Dewan Bandaraya Kuala Lumpur in conjunction with the centenary celebrations of DBKL as the local authority of Kuala Lumpur.

²⁴ See Elizabeth Cardosa, "Comment: Bok House Demolition: Ministry's Reasons Puzzling", 18 Dec 2006, retrieved at <http://www.badanwarisan.org.my/images/uploads/comment.doc>, viewed on 2.6.2007.

²⁵ See section 3(1) of the Heritage Act 2005.

An attempt to conserve historical buildings can be more promising with the inclusion of a general rule that all buildings built before a certain date which survive in anything like their original condition are listed as can be seen in the UK Planning Policy Guidance: Planning and the Historic Environment, better known as the PPG 15.²⁶ The heavy emphasis on the age and historical associations of buildings remained at present in UK with the revision of the PPG 15.²⁷ The rule that buildings less than 30 years old are normally listed if they are of outstanding quality and under threat has not been changed. The use of the words "under threat" is a further encouragement to a reactive approach to listing. However, such an approach is not free from criticism, as such is indicative of a mindset that seems to find it impossible to think of listed buildings as anything other than a kind of national museum.²⁸

Although cultural heritage is recognized under the National Heritage Act 2005, the cultural heritage under the act is confined to heritage sites, heritage objects, underwater cultural heritage and intangible cultural heritage which are confined to forms of expressions, sounds and music, dances and performances.²⁹ Hence, social practices, rituals and festive events are not a protected cultural heritage under this act. This explains why the living heritage in Penang, for instance, kampung which as a whole having heritage value (for example, Kampung Dodol) - the special status of the land as wakaf, an assertion that the first branch of UMNO was established there and the fame of the village's production of dodol would not qualify listed items of heritage under the National Heritage Act 2005. This is contrary to the Convention for the Safeguarding of Intangible Cultural Heritage where the importance of community participation in implementing the Convention which aims to safeguard cultural practices, such as oral traditions and expressions, including language as a vehicle of intangible cultural heritage; performing arts; social practices, rituals and festive events;

²⁶ Paragraphs 6.10-6.12.

²⁷ On July 25, 2005 the Department of Culture, Media and Sport and the Office of the Deputy Prime Minister published a consultation document "Revisions to Principles of Selection for Listing Buildings: Planning Policy Guidance Note 15".

²⁸ See John Sharland, "Listed Buildings and the Historic Environment – A Critique of the Government's Review of Heritage Policy," 36. J.P.L. 2005, DEC, 1552-1558, p. 1557. The new rule is that buildings which are less than ten years old are not listed except under the most exceptional circumstances.

²⁹ See section 2 regarding the interpretation of cultural heritage and intangible cultural heritage.

knowledge and practices relating to nature and the universe; and know-how linked to traditional crafts is adopted.³⁰

The “intangible cultural heritage” under the Convention means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artifacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.³¹ For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development. However, it is not surprising that such definition of cultural heritage is not included under the National Heritage Act 2005 as Malaysia is not a signatory to the convention.

Hence, as such many of the cultural villages in Penang would not be protected under the National Heritage Act 2005 as the cultural village does not qualify the definition of cultural heritage and intangible cultural heritage under the National Heritage Act 2005. The example of Kampung Dodol, one of the few remaining urban villages in Georgetown as mentioned earlier is under threat of development where most residents noticed the frequency and volume of floods had increased when the first high-rise apartment complex appeared in their area. Most of the villagers fear that it is only a matter of time before high-rises completely

³⁰ The first inscriptions on UNESCO’s List of Intangible Cultural Heritage in Need of Urgent Safeguarding and on the Organization’s Representative List of the Intangible Cultural Heritage of Humanity will take place in September 2009, according to the decision of the Intergovernmental Committee for the Safeguarding of the Intangible Heritage. See <http://www.unesco.org/culture/ich/>, viewed on 15.4.2008.

³¹ See Article 2(1) and 2(2).

engulfed the area, and the kampung would cease to exist – in spite of the special status of the land as wakaf as 62 houses in the village had already been torn down.³²

Status of Unsuccessful Listed Buildings

If a revised version of the 2003 Amendment to the Town and Country Planning Act 1976 is accepted, it would empower state and local authorities the authority in conservation matters. The designation of all properties or sites would then be a shared responsibility, with the new heritage authority at the federal level. Local authorities would then be involved in producing heritage conservation guidelines for owners/developers and in ensuring these guidelines are met according to good practice standards. The revised version of the 2003 Amendment of this Act if materialise could then enable the local authority to adopt the recommended practice of the UK where the local authority draws their own "local lists" which gives protection for many aspects of the "familiar and cherished local scene, similar to the revision of the UK PPG 15. This revised version of the PPG 15 makes recommendations that protection for many aspects of the "familiar and cherished local scene" should be made. This is very important as many such buildings are unlikely to meet the criteria for listing, as they lack the necessary "national" architectural or historic interest. Hence, since it is these individual buildings, usually of interest because of their local historical associations, which are most at risk.³³

The local list has its advantage in that once included in the development plan such policies become a material consideration for consideration in respect of development applications likely to affect these buildings, and section 54A of the UK Town and Country Planning Act 1990 stresses the importance of the development plan in determining applications.³⁴ Whilst this approval of "local listings" is to be welcomed, it must be appreciated that local plan policies if were to materialize in Penang, it does not give any kind of statutory protection, similar to the position in UK. Inclusion in a "local list" identifies a building as being of local interest; it suggests a willingness on the part of the local authority to protect it; but it does not actually give them any positive power to do so. The fact that the building is marked out as of

³² Peter Zabielskis, "At the Crossroads of History and Development: 'Unseen' Heritage and the Built Environment in an Urban Kampung in Penang", paper presented at the Penang Story – International Conference 2002, 18-21 April 2002, City Bayview Hotel, Penang.

³³ paragraph 6.16.

³⁴ Carolyn Shelbourn, "Protecting the Familiar and Cherished Local Scene," J.P.L. 1996, JUN, 463-470 [1996] J.P.L. 463.

local interest through its inclusion on a "local list" is simply one material consideration among many, and may be outweighed by other material considerations.³⁵

However since the introduction of the Town and Country Planning Act 1976 till at present, the local authority can impose condition on the approval of development over heritage buildings.³⁶ It is however important to note that if owners of historical buildings are subjected to unreasonable conditions, the owners have the right to apply to the High Court for order of certiorari; quashing order of the unreasonable conditions laid by the local authorities.

Notification of Planning Applications

Although the National Heritage Act 2005 provides the opportunity for the public to express their concern of historical buildings and nominate to the Minister in the prescribed form any natural heritage, tangible or intangible cultural heritage to be declared as a National Heritage,³⁷ a point that causes some difficulty in the preservation of historical buildings is that there is no general obligation to publish details of filed planning applications which may affect historical buildings under the Town and Country Planning Act 1976 as well as National Heritage Act 2005. Thus, the only mechanism for letting the public generally know the existence of a planning application is the general obligation to notify adjoining owners and this also applies to the adjoining owners of heritage buildings.³⁸

Whether such owners choose to share their privilege knowledge is of course entirely up to them; this may depend on how strongly they felt for the buildings that have historical values which would be affected by the proposed development. Therefore, the possibility of ignorant adjoining owners who would not oppose such development and do not care to share their knowledge to the public at large or the conservationists is deemed to be rather high as historical buildings do not affect their life directly, unlike environmental impacts due to development planning.

³⁵ Ibid.

³⁶ See section 22(5)(j)(k).

³⁷ See section 68.

³⁸ See section 21(6) of the Act 1976.

Public Participation

At present, there are some Malaysian cases which illustrate the difficulties encountered in establishing locus standi to challenge planning decisions which also applies to heritage conservationists. In *Abdul Razak Ahmad v Ketua Pengarah Kementerian Sains, Teknologi dan Alam Sekitar*,³⁹ the plaintiff, failed to establish locus standi to compel the State Government to produce its agreement with the developers of the 'floating city project' in Johor Bahru because the court held that the State Government was not obliged to consult taxpayers before entering into the agreement, and because the plaintiff had suffered no special damage over and above that suffered by other taxpayers and residents.⁴⁰ A similar result occurred when he attempted to establish the illegality of the planning permission itself. It was held that no legal right or interest of his land had been affected as he has not suffered any special damage and was not an adjoining owner and it should be noted that Abdul Malik Ishak J even stressed that that is the case even if there were breaches of the relevant byelaws by the local council in approving the project.⁴¹

From the above cases, it could be inferred that even if the Penang State contravene the National Heritage Act 2005 by not consulting the Commissioner of Heritage in approving any development planning which concerns heritage buildings registered under National Heritage Act 2005⁴², neither the public nor Penang Heritage Trust has the locus standi to the proceedings. Thus, if there are political abuses of the system, no one can object except the adjoining landowner, if there is any. Despite the technicalities mentioned above, unlike in China where individuals do not have the right to nominate sites for designation as protected heritage sites,⁴³ the right of public nomination⁴⁴ should be seen as an added point of National Heritage Act 2005 in the preservation of the historical buildings in Penang.

³⁹ Civil Suit No. 830/ 1993, High Court of Malaya, Johor Bahru, February 1994.

⁴⁰ *Abdul Razak Ahmad v Majlis Badaraya Johor Bahru* [1995] 2 MLJ 287 at p. 296.

⁴¹ Ibid.

⁴² See section 40 of the Act.

⁴³ Marina Svensson, In the Ancestors' Shadow, Cultural Heritage Contestations in Chinese Villages, Working Paper No 17, 2006, Centre for East and Southeast Asian Studies Lund University, Sweden, www.ace.lu.se/images/syd_och_sydstasiestudier/working_papers/M_svensson.pdf. In China, many sites are not listed as protected heritage sites but are of significance to local communities.

⁴⁴ Section 68 of the Heritage Act 2005.

Future Challenge: Preservation and Disability Access

There has been an increased awareness of the needs of disabled people both locally and nationwide. The Welfare Minister in 1999 herself made appeals to State Governments and local councils regarding the provision of disabled friendly facilities.⁴⁵ The Penang Executive Council (highest level of state Government) in their recent retreat at a 3-day Strategic Planning Workshop on 2-5 April 1999 have stated as part of their 10-year vision to make Penang disabled friendly.⁴⁶

Section 26 of the Persons with Disabilities Act 2008 which is yet to be enforced in Malaysia provides as follows:

(1) Persons with disabilities shall have the right to access to and use of, public facilities, amenities, services and buildings open or provided to the public on equal basis with persons without disabilities, but subject to the existence or emergence of such situations that may endanger the safety of persons with disabilities. .

(2) For the purposes of subsection (1), the Government and the providers of such public facilities, amenities, services and buildings shall give appropriate consideration and take necessary measures to ensure that such public facilities, amenities, services and buildings and the improvement of the equipment related thereto conform to universal design in order to facilitate their access and use by persons with disabilities.

However, in the event the Persons With Disabilities Act 2008 were to be enforced, there would be debatable preservation issues that would arise in heritage buildings. Since the issue of disability access has addressed much earlier in the UK, therefore, the following discussion examines the practice of disability access and means of compliance in heritage buildings in the UK.

In the UK, the carrying out of alterations to a listed building to make it more accessible by the less mobile, is a result of the duties imposed by the Disability Discrimination Act 1995 (which only came fully into force in October 2004). However, the provision for the disabled is comprehensively explained in the Disability Discrimination Act 1995, whereby many of the detailed provisions are absent in the Persons With Disabilities Act 2008 of Malaysia. As a

⁴⁵ New Straits Times (NST) – 12 May 1999.

⁴⁶ See www.geocities.com/silap/p39.htm, viewed on 5.4.2008.

result of that Disability Discrimination Act 1995, providers of services to the public must not discriminate against disabled people, but must:

"where a physical feature (for example, one arising from the design or construction of a building or the approach or access to premises) makes it impossible or unreasonably difficult for disabled persons to make use of such a service, ... to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to--

- (a) remove that feature;
- (b) alter it so that it no longer has that effect;
- (c) provide a reasonable means of avoiding the feature; or
- (d) provide a reasonable alternative method of making the service in question available to disabled persons." ⁴⁷

It will be noted that there is no order of priorities as between the different limbs of that duty; which, if any, of the steps specified must be taken will depend simply on what is "reasonable, in all the circumstances of the case". This is amplified in the Code of Practice issued by the Disability Rights Commission in UK.⁴⁸ As to what is a "physical feature", this is the subject of regulations that provide that more or less anything is capable of being a feature attracting the duty under the Disability Discrimination Act 1995, including any feature arising from the design or construction or any fixtures or fittings in a building occupied by the service provider.⁴⁹

As from December 4, 2006 in UK, all public authorities in carrying out their functions are to have due regard to "the need to eliminate discrimination that is unlawful under the Discrimination Act 1995."⁵⁰ This new duty will have to be balanced against the existing duties to have special regard to the preservation of historic buildings and areas. In any event, it is perhaps wise for authorities (and for applicants) to reflect on the guidance of the Secretary of State in PPG15:

⁴⁷ Disability Discrimination Act 1995, s.21(2).

⁴⁸ Disability Discrimination Act 1995: Code of Practice: Goods, Facilities, Service and Premises (produced by Disability Rights Commission, under s.53A(1) of the 1995 Act; brought into force on May 27, 2002, by SI 2002/720--available from TSO, £13.95).

⁴⁹ Disability Discrimination (Service Providers and Public Authorities Carrying out Functions) Regulations 2005 (SI 2005/2901), reg.9 (replacing Disability Discrimination (Services and Premises) Regulations 1999 (SI 1999/1191), reg.3, from December 4, 2006).

⁵⁰ Disability Discrimination Act 1995, s.49A, inserted by Disability Discrimination Act 2005, s.3 (and see 2005/2774).

"It is important in principle that disabled people should have dignified easy access to and within historic buildings. If it is treated as part of an integrated review of access arrangements for all visitors or users, and a flexible and pragmatic approach is taken, it should normally be possible to plan suitable access for disabled people without compromising a building's special interest. Alternative routes or re-organising the use of spaces may achieve the desired result, without the need for damaging alterations."⁵¹ This is all elaborated in a comprehensive Good Practice Guide issued relatively recently by the Office of the Deputy Prime Minister (ODPM), which also provides a list of useful contacts.⁵²

Hence, such comprehensive guidelines that are available in the UK would be useful reference for the relevant parties of the local authorities of Penang and the Federal government to adopt as part of the policies in balancing preservation and disability access in historical sites in Penang, specifically and Malaysia, generally.

Conclusion

The conservation of heritage in Penang is once again questioned when a new hotel building next to the Clock Tower is being approved by the government in late 2007. In fact, it was said that the modern-designed hotel will very tall that it will over-shadow the Clock Tower and render the tower totally invisible from the other side of the island once the hotel is completed in 2011. Such an approval to erect a new high rise in a designated heritage core zone has clearly violated the UNESCO's guidelines on World Heritage sites on preserving the ambience of a historical area and further jeopardising the chance of Georgetown getting into the World Heritage Site listing.⁵³ A development plan unless is restricted by the imposition of conditions under the National Heritage Act 2005,⁵⁴ could not successfully be objected by Penang Heritage Trust or any conservationists or any member of the public. It is reasonable to conclude that unless and until the seriousness of the local authority and Federal government is enshrined in the heritage policies and laws and seen to be implemented by the

⁵¹ PPG15, Planning and the Historic Environment, para.3.28.

⁵² Planning and Access for Disabled People: a Good Practice Guide. See particularly Chapter 10.

⁵³ See penangwatch.net/taxonomy/term/12 -, viewed on 20.4.2008.

⁵⁴ See section 40(3) and (4).

authorities, public participation would continue to be low in the preservation of multi-cultural heritage in Penang, thus retaining Penang's status as one of the World's Hundred Most Endangered Sites.

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